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No. 94-1288

In The

Supreme Court of the United States

October Term, 1994

Charles R. Wellman, M.D.,
Petitioner,

v.

Heartland Hospital East, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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No. 94-1280

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PETITIONER'S REPLY BRIEF

Respondents do not confront the defects in the Court of Appeal's analysis under the Sherman Act or in its application of summary judgment standards. Instead, Respondents contend that an inapplicable statute and an issue not reached by the Appeals Court — an issue on which a split of authority exists among the circuits — should preclude review of the issues presented by the petition. Neither of those concerns undermine the importance or vitality of the issues presented for review.

I. The Court Should Grant The Petition To Resolve The Proper Rule Of Reason Analysis Of Peer Review And The Appropriate Summary Judgment Standards Under *Kodak*.

Respondents defend the Court of Appeals' opinion only by misstating the issues Petitioner has presented for review and ignoring the Appeals Court's flawed antitrust analysis and Petitioner's evidence of conspiracy.[1] The Eighth Circuit misapplied the Rule of Reason by failing to consider the competitive impact of Dr. Willman's exclusion from the relevant market by assessing the quality of his care. But that decision is not unique. Other federal trial and appellate courts considering antitrust peer review cases routinely ignore the Rule of Reason as defined by this Court in *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978). *See* Starling, *Antitrust Defenses in Peer Review Cases*, 63 ANTITRUST L.J. 399, 408-09 (1995) ("*Peer Review*").

II. The Health Care Quality Improvement Act Does Not Diminish The Vitality Of The Issues To Be Reviewed.

The Health Care Quality Improvement Act of 1986, 42 U.S.C. §11101-11152 ("HCQIA"), is not applicable to this case[2] and has not altered the required Rule of Reason analysis of antitrust challenges to medical peer reviews. HCQIA provides only limited immunity from antitrust damages. 42 U.S.C. §11111. It is not a bar to suit and does not shield peer reviewers from suits seeking an injunction under the antitrust laws. *Id.* Furthermore,

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[1] Respondents focus instead on the disputed opinions of their medical expert witnesses who Respondents retained for this litigation.

[2] HCQIA was enacted after the events at issue in this case and is not retroactive. Even if Dr. Willman's peer review did not predate HCQIA, his reviewers would not be entitled to HCQIA immunity because they were his competitors. *See* 42 U.S.C. §11112(b)(3)(A)(iii).

HCQIA provides damage immunity only if the peer review meets specific criteria, including that direct competitors did not participate in the peer review. *Id.* Accordingly, most future peer review antitrust cases will continue to involve the proper application of the Rule of Reason and will not implicate HCQIA. *See* Busey, *The View From The Summit: Jurisdiction and Beyond*, 60 ANTITRUST L.J. 725, 754-55 (1992).

A recent analysis of peer review decisions confirms HCQIA's limited impact on antitrust challenges to peer reviews. *Peer Review*, at 421-25. Of twenty cases accruing after the effective date of HCQIA, HCQIA's limited immunity was an issue in only eleven. *Id.* at 421. The defendants prevailed on HCQIA grounds in only five of those cases. *Id.* at 422.

III. The Intracorporate Immunity Doctrine Does Not Diminish The Vitality Of The Issues To Be Reviewed.

The bulk of Respondents' brief is consumed by a discussion of the intracorporate immunity doctrine. That issue was not addressed by the Court of Appeals. It would not apply to the conspiracy among the physician defendants who are individuals. Furthermore, as the Eighth Circuit noted, the circuits are divided on the doctrine's applicability to peer review proceedings. App. A at A-7.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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